Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

BAYSHORE NATIONAL BANK OF LA PORTE, Petitioner

v.

DEAN RAY EVANS & JANE ELAINE EVANS, Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

****

PETITION FOR A WRIT OF CERTIORARI

****

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LAPORTE

40 pp

QUESTIONS PRESENTED

1. Whether a debtor's intent or motivation, rather than the type of transfer, is the operative element for determining whether a debtor should be discharged under 11 U.S.C. § 727(a)(2)(A).

2. Whether a debtor's intent behind a transfer is inherently an issue of fact which should not generally be subject to disposal by summary judgment.

3. Whether the statutory period of one year under 11 U.S.C. § 727(a)(2)(A) directly conflicts with the statutory period of states' fraudulent transfer statutes such as the Texas Fraudulent Transfer Act, Tex. Bus. & Comm. Code § 24.001 *et. seq.* (Vernon 1993).

4. Whether an equitable lien can be imposed on an exempt homestead when a debtor, with an intent to hinder, delay or defraud creditors, transfers all of his nonexempt assets into that exempt homestead.

LIST OF ALL PARTIES

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

BAYSHORE NATIONAL BANK OF LA PORTE, Petitioner

v.

DEAN RAY EVANS & JANE ELAINE EVANS, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Bayshore National Bank of La Porte respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (APP-1 - APP-3) is unreported and is listed in the Fifth Circuit Slip Opinions at Page 2771. The judgment of the District Court (APP-4 - APP-5) and the judgment of the Bankruptcy Court (APP-6 - APP-13) are unreported. No opinions were issued. The bankruptcy findings were made on the record and are provided in the Appendix (APP-14 - APP-30).

JURISDICTION

The Court of Appeals entered its judgment on February 7, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

1. 11 U.S.C. § 727 - Due to its length, the entire statute is reprinted in the Appendix pursuant to Supreme Court Rule 14. *See* APP-31 - APP-34.

2. Texas Fraudulent Transfer Act, Tex. Bus. & Comm. Code 24.001 *et seq.* (Vernon 1993) - Due to its length, the entire statute is set forth in the Appendix pursuant to Supreme Court Rule 14. *See* APP-35 - APP-50.

STATEMENT

I. Statement of Facts

In 1984, Respondents Dean Ray Evans and Jane Elaine Evans ("Respondents") executed two promissory notes (the "Notes") payable to Petitioner Bayshore National Bank of La Porte ("Petitioner"). In 1987, Respondents defaulted in payment of the notes. When Petitioner made demand on Respondents for payment, Respondents filed suit against

Petitioner in Texas state court (the "State Litigation"). Petitioner counterclaimed against Respondents for the sums owing under the Notes.

At the time Respondents sued Petitioner, Respondents had substantial cash and owned their homestead, rental homes, unencumbered real property in several counties, stocks and bonds.

Shortly after filing the State Litigation against Petitioner, Respondents engaged in a systematic conversion of all their nonexempt assets into exempt assets by selling their properties, stocks and bonds, encumbering with liens any unencumbered property, and converting their mutual fund to cash. Respondents then used all of their cash to purchase a more expensive homestead. When asked, Respondents denied that any changes in their assets had occurred. Petitioner was further precluded from finding out if there had been any change in Respondents' assets because of the pending State Litigation. Respondents, however, were not able to shield all of their cash assets in their new homestead,

so in January 1989, Respondents purchased two cashier's checks in the amounts of $22,000 and $11,000.

In February 1991, after Respondents had converted their nonexempt assets into their new exempt homestead and purchased the cashier's checks, Respondents agreed to a consent judgment against them for the full amount owed to Petitioner (the "Consent Judgment").

After receiving the Consent Judgment, Petitioner garnished Respondents' bank accounts at Texas Coastal Bank. When Texas Coastal Bank answered the garnishment, it stated that there were two outstanding cashier's checks, but that it did not know the location of the cashier's checks. After receiving Texas Coastal Bank's answer to the garnishment, Respondents took the two cashier's checks back to Texas Coastal Bank and asked Texas Coastal Bank to cash them. When Texas Coastal Bank would not cash the checks, Respondents then requested that the checks be applied towards their outstanding loan obligations at Texas Coastal Bank. At that time, Respondent Dean Evans was a

member of the Board of Directors of Texas Coastal Bank, and Respondents were not in default under the loans for which they requested the offset.

On November 19, 1991, Respondents then filed for relief under Chapter 7 of the Bankruptcy Code. When Respondents filed their bankruptcy, they listed six creditors, but Petitioner's judgment debt was the only true unsecured debt that Respondents owed. Further, at the time of Respondents' bankruptcy, Respondents had a joint annual income of over $105,000. Respondents also had over $300,000 in an exempt pension plan. The sole reason for Respondents' Chapter 7 bankruptcy was to discharge Petitioner's Consent Judgment.

II. Federal Jurisdiction

This case arose under Title 11 of the United States Code. The Bankruptcy Court's decision was appealed to the District Court pursuant to 28 U.S.C. §§ 157 and 158(a). The District Court affirmed the Bankruptcy Court and this decision was appealed to the Fifth Circuit Court of Appeals pursuant to 28 U.S.C. §§ 157 and 158(a).

III. **Proceedings Below**

On November 19, 1991, Respondents filed a voluntary petition for relief under Chapter 7 of Title 11 of the United States Code (the "Bankruptcy Code"). On February 28, 1992, Petitioner timely brought a cause of action seeking to bar Respondents' discharge under 11 U.S.C. § 727 and seeking to impose an equitable lien on Respondents' homestead pursuant to the Texas Fraudulent Transfer Act, Tex. Bus. & Comm. Code § 24.001 *et. seq.*

The Bankruptcy Court granted summary judgment in favor of Respondents with regard to the 11 U.S.C. § 727(a)(2)(A) causes of action relating to Respondents' conversion of nonexempt assets because such conversion did not occur within the one year statutory period provided by 11 U.S.C. § 727(a)(2)(A), but held a trial on the merits regarding the transfer of the two cashier's checks by Respondents. The Bankruptcy Court also granted summary judgment for Respondents denying Petitioner's causes of action under Tex. Bus. & Comm. Code § 24.005, and denied

Petitioner an equitable lien pursuant to Tex. Bus. & Comm. Code § 24.008.

After trial, the Bankruptcy Court stated that Respondent's "purpose of keeping [the cashier's] checks. . . was to keep them from his creditors obtaining those monies." *See* APP-17. The Court specifically found "for intent," but denied "relief because I don't think you have the proper type of transfer . . .." *See* APP-22.

The Bankruptcy Court granted the Final Judgment in favor of Respondents which was entered of record on November 3, 1993. Petitioner perfected its appeal to the United States District Court on April 27, 1995. The United States District Court affirmed the Final Judgment of the Bankruptcy Court, and Petitioner perfected its appeal to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit heard oral arguments and issued its opinion affirming the holdings of the District Court and the Bankruptcy Court on February 7, 1996.

REASONS FOR GRANTING THE PETITION

This Petition for writ should be granted because the decision of the Fifth Circuit Court of Appeals 1) involves an important question of federal law that has not been and should be settled by this Court; 2) sanctioned such a departure of existing law that it calls for an exercise of this Court's supervisory powers; and 3) has decided an important federal question in a way that conflicts with decisions of other United States Courts of Appeals on the same question.

I. Intent, Not The Type Of Transfer, Is The Operative Element Under 11 U.S.C. § 727(a)(2)(A)

The first question presented raises an issue that has not yet been decided by this Court; that is, whether the type of transfer made by the debtor, or whether the motive behind the transfer, is the operative element to bar a debtor's discharge under 11 U.S.C. § 727(a)(2)(A).

A. The Operative Element In 11 U.S.C. 727(a)(2)(A) Is Intent

11 U.S.C. § 727(a)(2)(A) provides that a debtor's discharge should be denied if he transfers property with the

intent to hinder, delay or defraud creditors. 11 U.S.C. § 727(a)(2)(A). The operative word in the statute is intent. The motivation or conduct behind the debtor's transfer is what a court must examine in determining whether a debtor should be discharged. The type of transfer is not relevant. No transfer will bar a debtor's discharge if it is determined by the trier of fact that debtor did not transfer the property with any intent to hinder, delay or defraud creditors. *See e.g., In re Miller*, 39 F.2d 301 (11th Cir. 1994).

B. A Preferential Transfer Can Be A Transfer For 11 U.S.C. § 727 Purposes.

Limiting the denial of a debtor's discharge by the type of transfer rather than the debtor's intent will erode the current definition of transfer as defined by the Bankruptcy Code.

11 U.S.C. § 101(48) defines transfer as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property . . .." 11 U.S.C. § 101(48). *See In the Matter of Smiley*, 864 F.2d 562, 565 (7th Cir. 1989). Congress

intended the definition of transfer to be all-inclusive and as broad as possible to encompass any surrender of an interest in property. Senate Report No. 95-989, 95th Cong. 2nd Sess. 26-27 (1978), reprinted in U.S. Code Cong. & Admin. News 5787, 5813; *See also* House Rep. No. 95-595, 95th Cong. 1st Sess. (1977), reprinted in U.S. Code Cong. & Admin. News 5963, 6271; *Smiley*, 864 F.2d at 565. The Senate Report provides:

> "The definition of transfer is as broad a possible. Many of the potentially limiting words in current law are deleted, and the language is simplified. Under this definition <u>any transfer of an interest in property is a transfer</u>, including a transfer of possession, custody or control even if there is not transfer of title, because possession, custody and control are interests in property."

Senate Report No. 95-989, 95th Cong. 2nd Sess. 26-27 (1978), reprinted in U.S. Code Cong. & Admin. News 5787, 5813. [Emphasis added]

Only one Court of Appeals, prior to this case, has published an opinion on this issue. *See In re Miller*, 39 F.3d

301. Although the Eleventh Circuit in *Miller* held that "[a] mere preferential transfer of this sort is not tantamount to a fraudulent transfer for the purposes of denying discharge," the Eleventh Circuit still found that it was the debtors' motivation behind the preferential transfer which governed the issue of discharge. *Miller*, 39 F.3d at 307. The fact that the transfer made by a debtor who attempts to hinder, delay or defraud creditors is later voided as preferential and the money is brought back into the bankruptcy estate, does not and should not allow a court to enter a debtor's discharge under 11 U.S.C. § 727.

C. <u>The Decision of the Court of Appeals Is Erroneous.</u>

The Fifth Circuit did not give any credence to the Bankruptcy Court's specific finding that Respondents intended to hinder or delay creditors. The Fifth Circuit completely ignored the Bankruptcy Court's findings that "the purpose of keeping those checks was not just to keep them separate from his other funds, but was to keep them from his creditors obtaining those monies," *See* APP-17, "you have an intent,

as I said before, to keep this money from creditors," *See* APP-21, and "I'm going to find for intent, ..." *See* APP-22. The Fifth Circuit apparently did not believe that this was intent to hinder, delay or defraud. However, if the purpose of the transfer was to keep this money from creditors, it is preposterous to believe that it is not an intent to hinder or delay creditors as contemplated by 11 U.S.C. § 727(a)(2)(A). *See e.g., In the Matter of Bowyer*, 916 F.2d 1056, 1059 (5th Cir. 1990); *Smiley*, 864 F.2d at 568.

Since the Bankruptcy Court found actual intent to hinder or delay creditors, the Fifth Circuit erred in adopting the Bankruptcy Court's finding that the type of transfer, rather than the debtor's motive, governed whether the debtor should be denied his discharge. *See* e.g., *Miller*, 39 F.3d at 307.

D. <u>Significance of the Question Presented</u>

This question is important because if the type of transfer is used as the operative element for deciding discharge issues under 11 U.S.C. § 727, then the central purpose of the

Bankruptcy Code will be severely diminished. This Court has previously stated:

> "[T]hat although the central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life with a clear field for future effort unhampered by the pressure and discouragement of preexisting debt,' the 'fresh start' policy is limited to the "honest but unfortunate debtor."

Grogan v. Garner, 498 U.S. 279, 287; 111 S.Ct. 654, 659 (1991) *(citing Local Loan Co. v. Hunt*, 292 U.S. 234, 244; 54 S.Ct. 695, 699 (1934)).

If a court finds the requisite intent to hinder, delay or defraud, but grants a debtor's discharge anyway because the transfer was only a preference, the Court rewards the dishonest debtor who intentionally is attempting to keep or hide assets from certain creditors. Granting a discharge to a debtor who has transferred hidden assets to a friendly creditor with the specific intent to hinder or delay another creditor, unlike the debtor who pays one past due creditor over another

merely because of undue pressure by that creditor, or who pays a creditor without realizing he is making a preferential payment, contradicts the purpose and intent of Title 11. *See Grogan*, 498 U.S. 279; 111 S.Ct. 654. The Fifth Circuit's affirmance of the Bankruptcy Court's findings in this case rewards the dishonest debtor by letting him disguise his fraudulent transfer as a preference.

There has been no case that holds that a preferential transfer cannot be used to bar a debtor's discharge under 11 U.S.C. § 727(a)(2)(A), if such preferential transfer is done with intent to hinder or delay a creditor. *See* e.g., *Miller*, 39 F.3d at 307. This case is significant and requires this Court's guidance to ensure that the motive and intent behind a debtor's transfer of assets, not the type of transfer that has occurred, are the guiding factors in determining whether a debtor's discharge should be granted.

II. Determination of Intent is Inherently a Fact Issue

The second question presented requires this Court to exercise its supervisory powers in that the Fifth Circuit's

affirmance of the Bankruptcy Court's decision is such a departure from the existing law that a review by this Court is necessary. Further, the Fifth Circuit's finding that there was not sufficient summary judgment evidence to show intent is clearly erroneous and conflicts with their own decision in *International Shortstop v. Rally's, Inc.*, 939 F.2d 1257 (5th Cir. 1991). The Bankruptcy Court only found that the transfers were outside the one year period and did not consider the continuing concealment doctrine espoused by the Fifth Circuit in *In re Oliver*, 819 F.2d 550 (5th Cir. 1987). Therefore, the Bankruptcy Court did not evaluate whether a genuine issue of a material fact existed as to the debtor's intent, which is the only requirement that a nonmoving party must show. Fed. R. Civ. P. Rule 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248; 106 S.Ct. 2505, 2510 (1986). The Fifth Circuit's affirmance was merely a "rubber stamp" and is in direct conflict with its own decisions in *International Shortstop*, 939 F.2d 1257, and *In re Oliver*, 819 F.2d 550.

A. The Fifth Circuit's Decision Is In Direct Conflict With *International Shortstop* and *Oliver*

In *International Shortstop*, the Fifth Circuit held that the issue of intent always raises a fact issue. *International Shortstop*, 939 F.2d at 1265. When state of mind or intent is an essential element of the non-moving party's claim, summary judgment should not be granted. *Id.* at 1265. *Miller* v. FDIC, 906 F.2d 972, 974 (4th Cir. 1990); *National Union Fire Ins. Co. v. Turtur*, 892 F.2d 199 (2nd Cir. 1989); *Ross v. John's Bargain Stores Corp.*, 464 F.2d 111 (5th Cir. 1972); *Jones v. Borden Co.*, 430 F.2d 568, 574 (5th Cir. 1970).

A summary judgment is not appropriate because a party's state of mind or intent is inherently a question of fact that turns on credibility. *International Shortstop*, 939 F.2d at 1265. *Ross*, 464 F.2d 111. *See 60 Ivy* Street *Corp. v. Alexander*, 822 F.2d 1432 (6th Cir. 1987). Summary judgment in these cases is inappropriate because the non-moving party cannot generally challenge the "self-serving testimony" of the moving party. The fact finder can only observe the demeanor of a witness and assess his credibility through live cross

examination. *International Shortstop,* 939 F.2d at 1265; *Alexander,* 822 F.2d 1432.

B. The Decision of The Court of Appeals Is Erroneous

The Fifth Circuit upheld the Bankruptcy Court's summary judgment because "Bayshore did not submit sufficient summary judgment evidence as to Evans' intent to conceal the transfers, or to hinder, delay or defraud, and because the transfers did not occur within one year of the Evans' filing . . .." *See* APP-2. This finding by the Fifth Circuit not only misrepresents the findings of the Bankruptcy Court, but is directly contrary to the findings in *International Shortstop.*

1. Summary Judgment Was Inappropriate

This Court has stated that:

> "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."

Anderson, 477 U.S. at 248; 106 S.Ct. at 2510.

Petitioner presented deposition testimony and affidavits to show the Respondents' conversion of their assets which occurred outside the one year statutory period of

11 U.S.C. § 727(a)(2)(A) were done after Respondents had sued Petitioner, thereby preventing Petitioner from being able to discover this conversion. Petitioner could not fully challenge the "self-serving testimony" of Respondents because Respondents' intent was an issue of credibility. The same evidence which was not sufficient to defeat the summary judgment was presented at trial on the remaining causes of action to show debtors' intent as to the transfer of the cashier's checks, and the Bankruptcy Court did, in fact, find that Respondents had intent to delay or hinder creditors. *See International Shortstop*, 939 F.2d at 1265.

Under the standards for granting summary judgment when intent is an issue as set forth in *Anderson* and *International Shortstop*, the Fifth Circuit's affirmance of the Bankruptcy Court's summary judgment sanctioned such a departure from existing law that this Court should exercise its supervisory powers.

2. Respondents, Transfers Were A Continuing Concealment

Further, the Fifth Circuit's affirmance of the Bankruptcy Court's summary judgment is contrary to its decision in *Oliver*. In *Oliver*, the Fifth Circuit held that transfers from a debtor that occurred outside the one year statutory period could be brought into the one year period if the transfers were concealed and such transfers would be construed as a continuing concealment. *Oliver*, 819 F.2d at 551. The Seventh Circuit has also found that although a transfer is outside the statutory one year period of 11 U.S.C. § 727(a)(2)(A), if the transfer is made to avoid a judgment, it constitutes a "continuing concealment." *In re Kaufman*, 675 F.2d 127, 128 (7th Cir. 1981).

Concealment for purposes of denying a discharge has a broader meaning than simply secreting or hiding away assets; it also means preventing discovery of assets or withholding knowledge of assets. *See In re Cycle Accounting Services*, 43 B.R. 264, 270-71 (Bankr. E.D. Tenn. 1984). *In*

re Erdman, 96 B.R. 978, 986 (Bankr.N.D. 1988); *In re Kirch*, 97 B.R. 919, 923-24 (Bankr. N.D. Ill. 1988).

In this case, after Respondents defaulted on their loans to Petitioner, they sued Petitioner to prevent it from collecting and discovering their assets. Almost immediately after bringing the suit against Petitioner, Respondents engaged in a systematic scheme to convert all of their nonexempt assets into exempt assets. *See* Statement of Facts, *supra.* After Respondents had transferred all of their nonexempt assets into exempt assets and hidden their remaining cash in the two cashier's checks, Respondents gave the Consent Judgment to Petitioner for the full amount of its debt, and took nothing on their alleged claims. When Petitioner discovered the existence of the two cashier's checks, Respondents transferred the cashier's checks to a friendly "creditor" and possible insider. Respondents then filed their Chapter 7 petition to discharge the Consent Judgment. At the time Respondents filed their Chapter 7 petition, the only transfers which actually fell within the one year statutory period

of 11 U.S.C. § 727(a)(2)(A) were the transfers of the two cashier's checks. However, under the circumstances of this case, Debtor's systematic conversion of all of their nonexempt assets into exempt assets was a continuing concealment. *See Oliver,* 819 F.2d 550. *See also In re Reed,* 700 F.2d 986 (5th Cir. 1993) (the transfer of non-exempt property for exempt property, when effectuated with actual intent to place the property beyond the reach of creditors, is fraudulent).

The end result is that Respondents, who earn over $105,000 per year, were able to walk away scot-free from their only debt, but were able to retain the value of all of their assets, while Petitioner was left with a huge loss. Respondents essentially used the Bankruptcy Code to rid themselves of their bad business debts, not because they couldn't afford the debt, but simply because they did not want to pay the debt.

The Fifth Circuit's decision in this case is such a departure from their decisions in *Reed and Oliver* that this Court should exercise its supervisory powers and decide the

standard that should be followed in evaluating transfers which fall outside the statutory period of 11 U.S.C. § 727(a)(2)(A) that are done with the intent to hinder, delay or defraud.

III. The One Year Statutory Period of 11 U.S.C. 727(a)(2)(A) Conflicts With State Fraudulent Transfer Acts

The last two questions presented for review by this Court involve an inherent conflict between the discharge statute, 11 U.S.C. § 727(a)(2)(A), and states' fraudulent transfer acts. The intent and purpose of the Bankruptcy Code is to give honest debtors a "fresh start," but not to encourage and enlarge the debtors' ability to be free of risk for transferring property to hinder, delay or defraud creditors within a state's fraudulent transfer act.

A. The One Year Statutory Period Conflicts With The Four Year Statutory Period Under The Texas Fraudulent Transfer Act

The Texas Fraudulent Transfer Act allows a creditor to void transfers that are made with actual intent to hinder, delay or defraud any creditor of the debtor for the later of a period of four years from the time the transfer was made, or one

year from when the transfer could have reasonably been discovered. Tex. Bus. & Comm. Code § 24.010(a)(1). *See U.S. v. Chapman*, 756 F.2d 1237 (5th Cir. 1985).

Although the Texas Fraudulent Transfer Act does not speak directly to the discharge issue, it affords creditors a remedy to recover fraudulently transferred property, which becomes limited if the one year statutory period of 11 U.S.C. § 727(a)(2)(A) is enforced without consideration of the continuing concealment doctrine. *See Oliver*, 819 F.2d at 551. Without allowing the consideration of the continuing concealment doctrine, the Texas Fraudulent Transfer Act is meaningless if a person files bankruptcy. Since most states' fraudulent transfer statutes allow creditors to void transfers which occur up to four years, the statutory period of 11 U.S.C. § 727(a)(2)(A) limits creditors' remedies and rewards dishonest debtors.

Tex. Bus. & Comm. Code § 24.008 provides that a creditor may obtain an avoidance of the transfer; or, in the alternative, may obtain an attachment or other provisional

remedy against the asset transferred or its proceeds. Tex. Bus. & Comm. Code § 24.008(b). In addition, if the creditor has obtained a judgment, Tex. Bus. & Comm. Code § 24.008(b) provides that a court may order that the creditor can levy execution on the asset transferred or its proceeds. Tex. Bus. & Comm. Code § 24.008(b). *In re Mortgage America Corp.*, 714 F.2d 1266, 1272-73 (5th Cir. 1983); *Texas Sand Co. v. Shield*, 381 S.W.2d 48, 55 (Tex. 1964). The Texas Supreme Court has held that "a conveyance which is found to be fraudulent as to creditors is wholly null and void as to such creditors" and the "legal as well as equitable title remains in the debtor for purposes of satisfying debts." *Texas Sand Co.*, 381 S.W.2d at 54.

Further, under Texas law,

> "a creditor may follow property fraudulently conveyed by the debtor and subject the proceeds [of the transferred property] to the payment of the creditor's debt. The conversion of the property by the grantee into other property does not prevent the creditors from following the property into its converted form."

Chapman, 756 F.2d at 1241 (*citing* Texas Jurisprudence, "Creditors Rights & Remedies," § 566 at p. 570, 1976). The property or its proceeds which is fraudulently transferred, when found by the creditor, may be seized and executed upon as though the transfer had never taken place. *Texas Sand Co.*, 381 S.W.2d at 55; *See Chapman*, 756 F.2d at 1240.

The United States District Court for the Northern District of Texas has held that creditors are entitled to an equitable purchase money lien against a homestead if the funds used to purchase such homestead were funds creditors were defrauded from. *In re Greene*, 40 B.R. 807 (Bankr. N.D. Tex. 1984). *See also In re Jones*, 50 B.R. 911, 923 (Bankr. N.D. Tex. 1985) (funds obtained by fraud and used for down payment of homestead allows imposition of an equitable lien); *Maryland Casualty Co. v. Schroeder*, 446 S.W.2d 117, 120-21 (Tex.Civ. App.—El Paso 1969, writ ref'd n.r.e.) (embezzled funds used to purchase homestead allowed equitable lien to creditor).

Respondents' transfers of their nonexempt assets into their exempt assets were clearly done with the intent to hinder, delay or defraud Petitioner. But for the one year statutory period imposed by 11 U.S.C. § 727(a)(2)(A), Petitioner would have been able to impose an equitable lien on the Respondents' homestead for the amount of the fraudulently transferred property. By the finding that the transfers were outside the one year period, and ignoring the continuing concealment doctrine as discussed in Section II(B)(2) *supra*, the decision in this case deprives Petitioner of its remedies and rewards the dishonest Respondents.

IV. The Questions Presented Are Important

In an era where bankruptcies are fraught with fraud, it is extremely important to uphold the integrity of the Bankruptcy Code. Allowing debtors to manipulate the meaning and policy behind the Bankruptcy Code to the debtor's benefit and the detriment of creditors erodes the Bankruptcy Code, has a chilling effect on the lending practices of creditors, and could be detrimental to the general public as a whole.

The unlimited homestead exemption in states like Texas and Kansas are incentive for debtors, such as Respondents in this case, to keep their creditors in the dark about their conversion activities. *See Smiley*, 864 F.2d at 568. By allowing the debtor his discharge and by also denying the creditor the ability to either void the transfer or impose an equitable lien, creditors are left with nothing, and debtors end up with everything. This not only flies in the face of the "fresh start" policy of the Bankruptcy Code for the honest debtor, but also will have a chilling effect on the lending and credit industry.

If requisite intent to keep assets from creditors is found, as it was in this case, creditors should at the very least be allowed to void the transfers that occurred within the statutory period of a state fraudulent transfer statute, if such statutory period is longer than that provided by the Bankruptcy Code. At the very least, the creditor should be allowed to impose an equitable lien against the exempt property into which the transfers occurred.

If this Court refuses to set standards for all courts to follow when debtors intentionally transfer all of their nonexempt assets into exempt assets to hinder creditors, then debtors will receive the message that the way to keep your assets is to sue your creditors over frivolous matters, and while the litigation is progressing, transfer all of your nonexempt assets into exempt assets, wait two or three years until the statutory period has run under the Bankruptcy Code, give a consent judgment, and then declare bankruptcy to wipe out the judgment. After the debtor follows this procedure, *voila*, he gets to keep all his assets and not pay any of his debts. This is certainly not the intent of the Bankruptcy Code nor the message that should be given to debtors.

This case raises several issues that if not decided by this Court, would diminish the central purpose of the "fresh start" policy of the Bankruptcy Code. If the decision in this case is upheld, the dishonest debtor will be afforded more opportunity to hinder, delay or defraud his creditors, while creditors and honest debtors are injured. The creditors are

injured by a reduction of remedies available to them to collect their debts. This in turn will hurt honest debtors, because creditors will be less likely to extend credit. A chilling effect on lending practices will result in many people not being able to purchase items necessary for their health and welfare, which ultimately will decrease the economic stability in this country. This Court now, through this case, has the opportunity to remedy this trend and uphold the integrity of the Bankruptcy Code.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LAW OFFICE OF MYNDE EISEN, P.C.

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ATTORNEYS FOR PETITIONER
BAYSHORE NATIONAL BANK
OF LA PORTE

Supreme Court, U.S.
FILED

96 55 MAY 7 1996

NO. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

BAYSHORE NATIONAL BANK OF LA PORTE, Petitioner

v.

DEAN RAY EVANS & JANE ELAINE EVANS, Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

****

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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LAPORTE

52 pp

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U.S. COURT OF APPEALS
FILED
FEB 07, 1996
CHARLES R. FULBRIDGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-20421

In The Matter of: DEAN RAY EVANS; JANE ELAINE EVANS

Debtors

BAYSHORE NATIONAL BANK OF LA PORTE,

Appellant,

v.

DEAN RAY EVANS; JANE ELAINE EVANS,

Appellees.

Appeal from the United States District Court
for the Southern District of Texas

Before KING, DAVIS, and BARKSDALE, Circuit Judges. PER CURIAM:

Bayshore National Bank of La Porte appeals the district court's affirmance of the bankruptcy court's discharge of Dean

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• Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

Ray Evans and Jane Elaine Evans in Chapter 7 bankruptcy. By focusing on the Evanses' transfer of nonexempt assets into their exempt homestead, Bayshore sought to bar the Evanses' general discharge pursuant to 11 U.S.C. § 727(a)(2) and to impose an equitable lien on their homestead pursuant to the Texas Fraudulent Transfers Act. Tex. Bus. & Com. Code §§ 24.005 and 24.008. The bankruptcy court granted summary judgment in favor of the Evanses on all causes of action regarding the homestead. Because we find that Bayshore did not submit sufficient summary judgment evidence as to the Evanses' intent to conceal the transfers, or to hinder, delay, or defraud, and because the transfers did not occur within one year of the Evanses' bankruptcy filing, we conclude that the district court did not err in affirming the bankruptcy court's summary judgment.

By focusing on the transfer by Dean Ray Evans of two cashier's checks to Texas Coastal Bank ("TCB"), Bayshore sought to bar the Evanses' general discharge pursuant to 11 U.S.C. § 727(a)(2) or, alternatively, to have the debt to

Bayshore declared nondischargeable pursuant to 11 U.S.C. § 523(a)(6). After trial on the merits, the bankruptcy court found that D. Evans' transfer of the cashier's checks was a preferential payment and not a transfer made to hinder, delay, or defraud creditors. The record supports that finding. Additionally, the bankruptcy court determined that Bayshore had no cause of action under § 523(a)(6) because Bayshore had no legal claim to the cashier's checks at the time that D. Evans transferred them to TCB. We agree with the lower courts that, on the facts presented, the transfer of the two cashier's checks to TCB did not justify denial of discharge under § 523(a)(6).

For the foregoing reasons, we AFFIRM the judgment of the district court.

UNITED STATES DISTRICT COURT
SOUTHER DISTRICT OF TEXAS
ENTERED
SEPT. 25, 1995
MICHAEL MILBY,
CLERK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BAYSHORE NATIONAL BANK OF LA PORTE,	§	
	§	
	§	Michael N. Milby, Clerk
Appellant,	§	
	§	
v.	§	CIVIL ACTION
	§	NO. H-93-4099
	§	
DEAN RAY and JANE ELAINE EVANS	§	
	§	
	§	
Appellees.	§	

ORDER

Pending before the Court is the appeal (Docket Entry #8) entered by BAYSHORE NATIONAL BANK OF LA PORTE ("Appellant") from the judgment of the United States Bankruptcy Court for the Southern District of Texas in Adversary No. 92-4113. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. § 158.

On November 2, 1993, United States Bankruptcy Judge William Greendyke entered Judgment (Bankruptcy Dkt. #77) from which the Appellant appeals. After considering pleadings, the record filed in the above-captioned matter the record of the bankruptcy proceedings and the applicable law, this Court finds that the Judgement entered by the United States Bankruptcy Court in this matter should be AFFIRMED.

It is so ORDERED.

The Clerk shall entered this Order and provide a true copy to all parties.

Signed this 24th day of April, 1995.

/s/ John D. Rainey

JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

C:\WORD5\BRKPPLD\0915JF01

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
NOVEMBER 03, 1993
Michael N. Milby, Clerk
By Deputy:
/s/ S. Guevaun

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE :	§	CASE NO.
	§	91-49239-H4-7
	§	
DEAN RAY EVANS and	§	CHAPTER 7
JANE ELAINE EVANS,	§	PROCEEDING
	§	
Debtors	§	
	§	
BAYSHORE NATIONAL	§	ADVERSARY NO.
BANK OF LA PORTE,	§	92-4113
	§	
Plaintiff	§	
	§	
DEAN RAY EVANS and	§	
JANE ELAINE EVANS,	§	TRUSTEE: HENSLEY
	§	
Defendants	§	JUDGE: GREENDYKE

FINAL JUDGEMENT

FINAL JUDGMENT

At said district came on for consideration the above-styled adversary case, and the Court, after considering the arguments of counsel, prior motions, orders by the Court, admissible judgment evidence, and after the submission of material disputed facts to a trial before the Court,

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that:

1. All causes of action brought by Bayshore National Bank of La Porte ("Bayshore") under 11 U.S.C. §727(a)(2) regarding the transfer of assets by Dean Ray Evans for the purchase of an allowed homestead are DENIED on the basis that such transfers did not occur within one year of the November 19, 1991 bankruptcy filing date.

2. All causes of action brought by Bayshore under 11 U.S.C §727(a)(2) against Dean Ray Evans regarding the

commencement of a lawsuit against Bayshore National Bank of La Porte are DENIED.

3. All causes of action brought by Bayshore under 11 U.S.C. §727(a)(2) against Dean Ray Evans relating to two cashier checks alleged to have been obtained by Defendant Dean Ray Evans are DENIED.

4. All causes of action brought by Bayshore against Dean Ray Evans under 11 U.S.C. §727(a)(3) are DENIED.

5. All causes of action brought by Bayshore against Dean Ray Evans under 11 U.S.C. §727(a)(4) are DENIED.

6. All causes of action brought by Bayshore against Dean Ray Evans under 11 U.S.C. §727(a)(5) are DENIED.

7. All causes of action brought by Bayshore against Dean Ray Evans under 11 U.S.C. §523(a)(2) are DENIED.

8. All causes of action brought by Bayshore against Dean Ray Evans under 11 U.S.C. §523(a)(4) are DENIED.

9. All causes of action brought by Bayshore against Dean Ray Evans under 11 U.S.C. §523(a)(6) including that relating to two cashier checks allegedly obtained by Dean Ray Evans are DENIED.

10. All causes of action brought by Bayshore against Dean Ray Evans pursuant to the Texas Uniform Fraudulent Transfer Act, Tex. Bus. & Com. Code §24.001, *et seq*, are DENIED.

11. All causes of action brought by Bayshore against Jane Elaine Evans under 11 U.S.C. §727(a)(2) regarding the transfer of assets by Jane Elaine Evans to purchase an allowed homestead are DENIED on the basis that such transfers did not occur within one year of the November 19, 1991 bankruptcy filing date.

12. All causes of action brought by Bayshore against Jane Elaine Evans under 11 U.S.C. §727(a)(2) regarding the commencement of a lawsuit against Bayshore National Bank of La Porte are DENIED.

13. All causes of action brought by Bayshore against Jane Elaine Evans under 11 U.S.C. §727(a)(2) relating to two cashier checks alleged to have been obtained by Dean Ray Evans are DENIED.

14. All causes of action brought by Bayshore against Jane Elaine Evans under 11 U. S.C. §727(a)(3) are DENIED.

15. All causes of action brought by Bayshore against Jane Elaine Evans under 11 U.S.C. §727(a)(4) are DENIED.

16. All causes of action brought by Bayshore against Jane Elaine Evans under 11 U.S.C. §727(a)(5) are DENIED.

17. All causes of action brought by Bayshore against Jane Elaine Evans under 11 U.S.C. §523(a)(2) are DENIED.

18. All causes of action brought by Bayshore against Jane Elaine Evans under 11 U.S.C. §523(a)(4) are DENIED.

19. All causes of action brought by Bayshore against Jane Elaine Evans under 11 U.S.C. §523(a)(6) including that relating

to two cashier checks allegedly obtained by Dean Ray Evans are DENIED.

20. All causes of action brought by Bayshore against Jane Elaine Evans pursuant to the Texas Uniform Fraudulent Transfer Act, Tex. Bus. & Com. Code §24.001, *et seq*, are DENIED.

21. Costs of Court are adjudged against Bayshore National Bank of La Porte.

22. Final Judgment is GRANTED in favor of Dean Ray Evans and against Bayshore National Bank of La Porte.

23. Final Judgment is GRANTED in favor of Jane Elaine Evans and against Bayshore National Bank of La Porte.

24. The Clerk of the Court shall issue the Order of Discharge for Dean Ray Evans.

25. The Clerk of the Court shall issue the Order of Discharge for Jane Elaine Evans.

26. This is a Final Judgment.

SIGNED the 2nd day of November, 1993.

/s/ William Greendyke
WILLIAM GREENDYKE
UNITED STATES BANKRUPTCY JUDGE

APPROVED AS TO FORM:

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ATTORNEY FOR PLAINTIFF
BAYSHORE NATIONAL BANK OF LA PORTE

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

BAYSHORE NATIONAL BANK	§	CASE NO. 92-4113-H4-ADV.
VERSUS	§	HOUSTON, TEXAS
DEAN RAY EVANS	§	SEPTEMBER 15, 1993 9:32 TO 12:20 O'CLOCK P.M.

TRIAL

BEFORE THE HON. WILLIAM GREENDYKE, UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Plaintiff:

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For the Defendant:

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Houston, Texas 77074

Court Recorder:

BRENT LASWELL

PREPARED BY:
JUDICIAL TRANSCRIBERS
OF TEXAS, INC.
7035 West Tidwell
Building J, Suite 109
Houston, Texas 77092
(713) 462-6434

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

THE COURT: Ms. Eisen, I want to try and make some findings. I don't know that there's going to be a whole lot more that either one of you are going to tell me that's going to push me over the edge, legally, today.

My approach to 523A6 is as I described by means of an example earlier has been a tort approach. I've had people argue to me that if somebody does something wrong with the creditor's collateral, that the entire amount of the debt becomes nondischargeable. I don't think that's appropriate, and I've ruled that way many times in the past, that the amount of nondischargeability, if you will, under 523A6 is based upon the amount of damage that results from the wrongdoing. It's — My label is a tort approach.

My question to you earlier centered around what right did Bayshore have to the money so that we had a tort being committed. One of the principles of 523A4, and I'll make another analogy to you somewhat esoterically, is that your trust agreement had to predate or precede the breach that you're

complaining of so that you can't have a trust resulting from the act that you're complaining of and have that float for purposes of nondischargeability. You have to have a preexisting trust relationship and obligation and then a breach so that you don't have a constructive trust liability or purchase money or resulting trust liability. There's got to be a trust fund set up, a trust obligation by state law or by, whatever, or by formal agreement, and then a subsequent breach of that fiduciary responsibility.

In this instance, the complaint that you're making is that the tort is a preference payment. It's sort of the same way. You don't have a preexisting arrangement. You don't have a preexisting duty in my mind that he is ignoring. You don't have a tort. You don't have something that he has done wrong separate and apart from the obligation centering around preference payments.

That remedy, that preference remedy, is a bankruptcy remedy. In the absence of the filing of the bankruptcy case, you wouldn't have the similar right under state law. I mean, I know we wouldn't be talking about dischargeability in the

absence of a bankruptcy case, but you don't have a separate tort. You just have an asset that you're trying to collect.

Based upon what I've seen, I think, as a matter of law, now, there's no 523A6 cause of action. I'm going to find as we mentioned in the argument that we — that the Debtor, obtained cashier's checks in the total amount, approximately, of $33,000, partially in January of 1989 - I believe that's the right month - and July of 1990. He maintained those. I think the purpose of keeping those checks was not just to keep them separate from his other funds, but was to keep them from his creditors obtaining those monies. I believe that. I believe there was enough going on in his life for me to feel comfortable in finding that he was trying to preserve that money, just like it was a cash equivalent, which it was, that he was keeping out of banks, whatever.

The one-year period occurred or rolled up or accrued, and he still was keeping those funds in his back pocket, figuratively speaking. A Judgment was taken by Bayshore in February of - I believe it was February —

MS. EISEN: 1991.

THE COURT: What is the date of the Judgment?

MS. EISEN: February 26, 1991.

THE COURT: Okay. February of 1991. I have some problem in finding that he was unaware of the Judgment. I mean, I heard his testimony. I'm more troubled by the lack of reaction, if you will, to the knowledge of the Judgment, that he testified about. And that's why I asked him questions about it. My dealing with people like Mr. Evans for a number of years and just people in general, I find it incomprehensible that somebody could have $400,000 Judgment taken against him and not wring some lawyer's neck if he didn't know about it. I mean, that's human nature. Maybe Mr. Evans is the most forgiving person in the whole world, I don't know. I find that a little incredible, and I have the right to make that finding and the prerogative to make that finding. So I'm troubled by that.

I don't think it's particularly relevant, but I wanted to touch upon it since we have so much about it. So during the one-year period commencing in November of 1990 up until

the time of the garnishment, we're still in a holding pattern with regard to the money. We're still keeping it in our back pocket, if you will.

I'll also find that there is no real opportunity during that one-year period for him to disclose the existence of the money to Bayshore. No one has made me aware of any discovery. No one has made me aware of any request for Financial Statements or any responses that needed to be made under oath, or at all, where he misrepresented or kept from them when asked any kind of question, the existence of those funds. He's saving it in a very peculiar manner, basically.

The garnishment gets filed. He becomes aware of the garnishment. He then at that point goes to Texas Coastal and is obviously worried about the status of his cashier's checks in light of the garnishment, since his cashier's checks were issued by Texas Coastal. So he asks first whether or not they will cash the checks, and they say no. His second choice is to apply it to the Texas Coastal debt, which is, coincidentally, in about the same amount as the two checks combined. His

guaranty liability on the Nail loan and his car note, interest and principal is about the same.

Apparently they take the checks at that point, and everybody comes clean. Here they are. They filed the Amended Answer to the garnishment. The bank, Texas Coastal, makes everyone aware, obviously, with the consent and ratification of the Debtor, that the checks are there. And Texas Coastal holds them. Ostensibly, there's some legal activity or some negotiations in the interim from July until November of 1991. Nothing happens to the money. The bankruptcy case gets filed in our one year period of November the 16th, or whatever it is, gets determined. And I'll take notice of the docket for the date of filing of the case, and I may have the date wrong, but I'm close enough.

The Debtor discloses the existence, formally, many times in his bankruptcy filings. There is no attempt to conceal beyond July 22nd of 1991, and, in fact, there's multiple items of revealment, if you will, of the existence of the checks. The money is turned over to the bankruptcy estate after demand is

made, and a compromise is filed, and we approve. And I'll take notice of my exhibits here and also the contents of my main case docket.

The transfer, in my mind, to Bayshore — or to Texas Coastal of the cashier's checks was a preference payment. He preferred one creditor over another when he turned the money over. His first choice was to keep the money. He attempted to get cash, and there was no evidence of what he would have done with that cash, however relevant that might have been; but that didn't work out. So we don't have a verb at that point for taking the money and doing something with the cash.

The only thing he did do was he gave the checks over to Texas Coastal. So, to that extent, you know, literally, there was a transfer to them. But I think the transfer was a preference transfer in my mind.

I think, ma'am, you have an intent, as I said before, to keep this money from creditors. My problem is with the verb. My problem is, is that I don't think that this fits under, for

purposes of barring the man's discharge, classical examples of transfers in hindrance of creditors. It's a preference transfer and not a transfer in hindrance of creditors. You know, there may be a case out there that says that a preference payment, preferring one creditor over another, is one that satisfies that requirement. I just don't see it.

The transfer that I'm thinking of is the transfer to the daughter or to the mother or to the business partner in the Caymen Islands, or something like that, to get the money out of the hands of another creditor. The existence of the debt in the hands of Texas Coastal in the same amount, basically, as the cashier's checks, ameliorate that effect, lessen that effect to some extent.

I'm also troubled by the fact that it is a preference type payment and that remedy, that situation, is one which a remedy exists under bankruptcy law; so, in effect, the money is coming back. I'm going to find for intent, but I'm going to deny relief because I don't think you have the proper type of transfer, and the Debtor has, in effect — the situation has remedied itself.

I don't know that I want to invite further briefs. I feel — you may want to tell me that I'm wrong. You may just want to take the whole thing up.

MS. EISEN: What I would like to do is see if you — I would like a finding on that Texas Coastal Bank was an insider by virtue of his being a director on the bank, or at least a finding that he was a director -

THE COURT: An insider under what definition?

MS. EISEN: That — Well, or just even a finding that he was a director of the bank.

THE COURT: Oh, I'll find that he was a director of the bank. I'll find that he did not -

MS. EISEN: And the -

THE COURT: — attend any meetings during -

MS. EISEN: '92.

THE COURT: — 1992, but he was an active director per his own testimony in '91 and '92 and has only recently resigned as a director of the bank.

MS. EISEN: And I'd also like a finding on the record I that the testimony showed that he was current on — that he resumed payments on the notes to Texas Coastal Bank.

THE COURT: When?

MS. EISEN: I don't remember exactly what he testified to.

THE COURT: There was some equivalent testimony -

MS. EISEN: Shortly after the bankruptcy, he testified.

THE COURT: — equivocal testimony about his payments.

MS. EISEN: On -

THE COURT: I think the payments are now current. I think there was some gap in the payments. I -

MR. FOGO: Your Honor, I believe the testimony is that there was a gap in the payments, and he resumed payments on the car loan, and that was — his testimony was that the loan was refinanced and renewed.

THE COURT: This is all after the date of filing, though; right?

MR. FOGO: Correct.

THE COURT: So as of July of -

MS. EISEN: He was -

MR. FOGO: '91.

THE COURT: — '91, he was current.

MS. EISEN: He was current.

THE COURT: Can we stipulate to that? After the date of the garnishment, he was current. Everything was fine with Texas Coastal.

MR. FOGO: That's fine. That those common law pledge remedies are well entrenched in state law, Your Honor, that banks have that interest.

THE COURT: He still owes money to the bank. There's no doubt about it, but the loans — we have no evidence that the loans were in default in July of 1991 at Texas Coastal Bank. That's a fair finding. I don't think we talked about that. All right. Anything else?

MR. FOGO: May I draft the Judgment then, Your Honor?

THE COURT: Yes. Per our prior discussions, I think it

ought to incorporate what we've done previously and go up. I don't really want to make any further findings and conclusions. I think I've been pretty verbose, and it's been pretty short and sweet, based on the way you've pitched it. I'll rely upon my verbal findings and conclusions and will sign a formal Judgment denying the relief requested and allowing the discharge to go forward, subject to whatever motions you might file.

My preference if you're going to try and stop the entry of the discharge is that you just go ahead and tell the District Court to stay entry of the discharge and that I have had told you not to even bother coming through me. I usually decline not to stay execution or enforcement of my judgments because one of the findings I need to make is that you're likely to flip me on appeal, and I don't think that that's — so I'd just as soon you go to the District Court with my blessing and see if you can I convince them to go ahead and stop entry of discharge, if that's what you want to do.

MS. EISEN: Your Honor, if we do appeal, I was going to file a motion to reconsider the Summary Judgment because,

obviously, the new case law that's come out, but I can do that on the appellate level and just take the whole thing up -

THE COURT: I'm not telling you not to tell me to reconsider, but I have no idea what you're talking about and would rely upon you. If you want to ask me to reconsider, have at it, and tell me what the law is. Don't do it just for the sake of wasting your time or, you know, making a predicate, preserving your right to appeal. If I'm wrong on the law, I want to know about it. And I made some assumptions here about the transfers or the concealments that, you know — nobody has talked about case law, and I'm not aware of any so far that really touch upon this in a similar type of situation where somebody has barred discharge based upon a preference payment.

MS. EISEN: That actually is not the part of the Summary Judgment that I would be moving. It's on the concealment of the homestead assets which weren't part of this trial.

THE COURT: Okay.

MS. EISEN: There was a new case that came down on the concealment issue out of Judge Brown's court in William Patrick Cantrell, case number 91-047.

THE COURT: I'm not familiar with it.

MR. FOGO: Your Honor, I did provide for you during our previous Summary Judgment hearings and would bring the Court's attention again to McWinney versus Goodnight, which is a Texas Court of Appeals, 1939 case, albeit several years old.

THE COURT: Folks, I felt real comfortable with what I did on the Motion for Summary Judgment in connection with the homestead. I mean, I challenged that from the very start. That gave me a funny feeling from the outset. But if Judge Brown has done something, I'm interested in it. And if it's on point, I'm interested in it, and feel free to make your, you know, brief, terse, here's something different Motion to Reconsider, and I'll look at it.

MR. FOGO: But it is well established in Texas State Law that every Debtor has -

THE COURT: Don't argue it now, Mr. Fogo. I -

MR. FOGO: Yeah.

THE COURT: I want to read her case first. I think that's really where we start. So you're going to give me a Judgment, and you're probably going to file a Motion to Reconsider before he sends me the Judgment, hopefully.

MS. EISEN: Yeah.

THE COURT: And I'll just do it all at once. If I need a further hearing or want to draw you all back to talk about the Motion to Reconsider, I will. I've got my exhibits. I've made my findings. I'm set. Thank you all. It was very plainly put to me, and I appreciate that.

MS. EISEN: Do you want the original exhibits, Your Honor?

THE COURT: We need to maintain those; yes, ma'am.

MS. EISEN: Yeah.

THE COURT: If you're talking about original copies of documents, I don't need those. Whatever the Witness has been using will serve as the original exhibit. I just need to keep one set. Okay. We'll be in recess until two.

(These proceedings adjourned at 12:20 p.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Linda Levy
Signature of Transcriber

12-6-93
Date

SECTION 727 (11 U.S.C. § 727)

§ 727. Discharge.

(a) The court shall grant the debtor a discharge, unless—

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case—

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

(6) the debtor has refused, in the case—

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against selfincrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under sections 14, 371, or 476 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under sections 1228 or 1328 of this title, or under sections 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least—

(A) 100 percent of the allowed unsecured claims in such case; or

(B) (i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort; or

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter.

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

(c) (1) The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section.

(2) On request of a party in interest, the court may order the trustee to examine the acts and conduct of the debtor to determine whether a ground exists for denial of discharge.

(d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if—

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be

property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee; or

(3) the debtor committed an act specified in subsection (a)(6) of this section.

(e) The trustee, a creditor, or the United States trustee may request a revocation of a discharge—

(1) under subsection (d)(l) of this section within one year after such discharge is granted; or

(2) under subsection (d)(2) or (d)(3) of this section before the later of—

(A) one year after the granting of such discharge; and

(B) the date the case is closed.

Bankruptcy Rule References: 1017, 2002, 4004, 4005, 4006, 4008 and 7001

CHAPTER 24. UNIFORM FRAUDULENT TRANSFER ACT

Section
24.001. Short Title.
24.002. Definitions.
24.003. Insolvency.
24.004. Value.
24.005. Transfers Fraudulent as to Present and Future Creditors.
24.006. Transfers Fraudulent as to Present Creditors.
24.007. When Transfer is Made or Obligation is Incurred.
24.008. Remedies of Creditors.
24.009. Defenses, Liability, and Protection of Transferee.
24.010. Extinguishment of Cause of Action.
24.011. Supplementary Provisions.
24.012. Uniformity of Application and Construction.
24.013. Repealed.

This chapter, which consisted of §§ 24.01 to 24.05, was amended by Acts 1987, 70th Leg., ch 1004, § 1, to read as provided for in §§ 24.001 to 24.013.

DISPOSITION TABLE

Showing where provisions of former Chapter 24 are now covered in amended Chapter 24.

Former Sections	Amended Sections
24.01	24.002
24.02(a)	24.006
24.02(b)	24.009
24.03	24.006
24.04	24.013
24.05	24.007, 24.008

24.001. Short Title

This chapter may be cited as the Uniform Fraudulent Transfer Act. --- Amended by Acts 1987, 70th Leg., ch. 1004, § 1, eff. Sept. 1, 1987. --- Application of 1987 Act to transfers made and obligations incurred with respect to its effective date, see note following § 24.007.

§ 24.002. Definitions

In this chapter:

(1) "Affiliate" means:

(A) a person who directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities:

(i) as a fiduciary or agent without sole discretionary power to vote the securities; or

(ii) solely to secure a debt, if the person has not exercised the power to vote;

(B) a corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor or a person who directly or indirectly owns, controls, or holds, with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities:

(i) as a fiduciary or agent without sole power to vote the securities; or

(ii) solely to secure a debt, if the person has not in fact exercised the power to vote;

(C) a person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor; or

(D) a person who operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

(2) "Asset" means property of a debtor, but the term does not include:

(A) property to the extent it is encumbered by a valid lien;

(B) property to the extent it is generally exempt under nonbankruptcy law; or

(C) an interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant, under the law of another jurisdiction.

(3) "Claim" means a right to payment or property, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(4) "Creditor" means a person, including a spouse, minor, or ward, who has a claim.

(5) "Debt" means a liability on a claim.

(6) "Debtor" means a person who is liable on a claim.

(7) "Insider" includes:

(A) if the debtor is an individual:

(i) a relative of the debtor or of a general partner of the debtor;

(ii) a partnership in which the debtor is a general partner;

(iii) a general partner in a partnership described in Subparagraph (ii) of this paragraph; or

(iv) a corporation of which the debtor is a director, officer, or person in control;

(B) if the debtor is a corporation:

(i) a director of the debtor;

(ii) an officer of the debtor;

(iii) a person in control of the debtor;

(iv) a partnership in which the debtor is a general partner;

(v) a general partner in a partnership described in Subparagraph (iv) of this paragraph; or

(vi) a relative of a general partner, director, officer, or person in control of the debtor;

(C) if the debtor is a partnership:

(i) a general partner in the debtor;

(ii) a relative of a general partner in, a general partner of, or a person in control of the debtor;

(iii) another partnership in which the debtor is a general partner;

(iv) a general partner in a partnership described in Subparagraph (iii) of this paragraph; or

(v) a person in control of the debtor;

(D) an affiliate, or an insider of an affiliate as if the affiliate were the debtor; and

(E) a managing agent of the debtor.

(8) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.

(9) "Person" means an individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.

(10) "Property" means anything that may be the subject of ownership.

(11) "Relative" means an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree.

(12) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance. The term does not include a transfer under a disclaimer filed under Section 37A, Texas Probate Code, or Section 112.010, Property Code.

(13) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

Amended by Acts 1987, 70th Leg., ch. 1004, § 1, eff. Sept. 1, 1987; Acts 1993, 73rd Leg., ch. 846, § 2, eff. Sept. 1, 1993.

Application of 1987 Act to transfers made and obligations incurred with respect to its effective date, see Historical Note following § 24.007.

Section 35(a) of the 1993 amendatory act provides:

"The changes in law made by Sections 1, 2, and 3 of this Act apply only to a disclaimer made on or after the effective date of this Act. A disclaimer made before the effective date of this Act is covered by the law in effect when the disclaimer was made, and the former law is continued in effect for that purpose."

§ 24.003. Insolvency

(a) A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation.

(b) A debtor who is generally not paying the debtor's debts as they become due is presumed to be insolvent.

(c) A partnership is insolvent under Subsection (a) of this section if the sum of the partnership's debts is greater than the aggregate, at a fair valuation, of all of the partnership's assets and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.

(d) Assets under this section do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making the transfer voidable under this chapter.

(e) Debts under this section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset.

Amended by Acts 1987, 70th Leg., ch. 1004, § 1, eff. Sept. 1, 1987; Acts 1993, 73rd Leg., ch. 570, § 8, eff.£ Sept. 1, 1993. Application of 1987 Act to transfers made and obligations incurred with respect to its effective date, see note following § 24 007.

§ 24.004. Value

(a) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

(b) For the purposes of Sections 24.005(a)(2) and 24.006 of this code, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

(c) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.

(d) "Reasonably equivalent value" includes without limitation, a transfer or obligation that is within the range of values for which the transferor would have sold the assets in an arm's length transaction.

Amended by Acts 1987, 70th Leg., ch. 1004, § 1, eff. Sept. 1, 1987; Acts 1993, 73rd Leg., ch. 570, § 9, eff. Sept. 1, 1993.

Application of 1987 Act to transfers made and obligations incurred with respect to its effective date, see note following § 24.007.

§ 24.005. Transfers Fraudulent as to Present and Future Creditors

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or within a reasonable time after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(B) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

(b) In determining actual intent under Subsection (a)(1) of this section, consideration may be given, among other factors, to whether:

(1) the transfer or obligation was to an insider;

(2) the debtor retained possession or control of the property transferred after the transfer;

(3) the transfer or obligation was concealed;

(4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) the transfer was of substantially all the debtor's assets;

(6) the debtor absconded;

(7) the debtor removed or concealed assets;

(8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Amended by Acts 1987, 70th Leg., ch. 1004, § 1, eff Sept. 1, 1987; Acts 1993, 73rd Leg., ch. 570, § 10, eff. Sept. 1, 1993.

Application of 1987 Act to transfers made and obligations incurred with respect to its effective date, see note following § 24.007.

§ 24.006. Transfers Fraudulent as to Present Creditors

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

Amended by Acts 1987, 70th Leg., ch. 1004, § 1, eff. Sept. 1, 1987.

Application of 1987 Act to transfers made and obligations incurred with respect to its effective date, see note following § 24.007.

§ 24.007. When Transfer is Made or Obligation is Incurred

For the purposes of this chapter:

(1) a transfer is made:

(A) with respect to an asset that is real property other than a fixture, but including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good faith purchaser of the asset from

the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee; and

(B) with respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under this chapter that is superior to the interest of the transferee;

(2) if applicable law permits the transfer to be perfected as provided in Subdivision (1) of this section and the transfer is not so perfected before the commencement of an action for relief under this chapter, the transfer is deemed made immediately before the commencement of the action;

(3) if applicable law does not permit the transfer to be perfected as provided in Subdivision (1) of this section, the transfer is made when it becomes effective between the debtor and the transferee;

(4) a transfer is not made until the debtor has acquired rights in the asset transferred; and

(5) an obligation is incurred:

(A) if oral, when it becomes effective between the parties; or

(B) if evidenced by a writing, when the writing executed by the obligor is delivered to or for the

benefit of the obligee.

Amended by Acts 1987, 70th Leg., ch. 1004, § 1, eff Sept. 1, 987.

Section 2 of the 1987 Act provides:

"This Act applies only to transfers made and obligations incurred by debtors, as determined under Section 24.007, Business & Commerce Code, as added by this Act, on or after

the effective date of this Act Transfers made and obligations incurred before that date are governed by the law in effect immediately before this Act took effect, and that law is continued in effect for that purpose."

§ 24.008. Remedies of Creditors

(a) In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in Section 24.009 of this code, may obtain:

(1) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(2) an attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the applicable Texas Rules of Civil Procedure and the Civil Practice and Remedies Code relating to ancillary proceedings; or

(3) subject to applicable principles of equity and in accordance with applicable rules of civil procedure:

(A) an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

(B) appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(C) any other relief the circumstances may require.

(b) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

Amended by Acts 1987, 70th Leg., ch. 1004, § 1, eff. Sept. 1, 1987.

Application of 1987 Act to transfers made and obligations incurred with respect to its effective date, see note following § 24.007.

§ 24.009. Defenses, Liability, and Protection of Transferee

(a) A transfer or obligation is not voidable under Section 24.005(a)(1) of this code against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(b) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under Section 24.008(a)(1) of this code, the creditor may recover judgment for the value of the asset transferred, as adjusted under Subsection (c) of this section, or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

(1) the first transferee of the asset or the person for whose benefit the transfer was made; or

(2) any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.

(c)(1) Except as provided by Subdivision (2) of this subsection, if the judgment under Subsection (b) of this section is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

(2) The value of the asset transferred is not to be adjusted to include the value of improvements made by a good faith transferee, including:

(A) physical additions or changes to the asset transferred;

(B) repairs to the asset;

(C) payment of any tax on the asset;

(D) payment of any debt secured by a lien on the asset that is superior or equal to the rights of avoiding creditor under this chapter; and

(E) preservation of the asset.

(d) (1) Notwithstanding voidability of a transfer or an obligation under this chapter, a good faith transferee or obligee is entitled, at the transferee's or obligee's election, to the extent of the value given the debtor for the transfer or obligation, to:

(A) a lien, prior to the rights of avoiding creditor under this chapter, or a right to retain any interest in the asset transferred;

(B) enforcement of any obligation incurred; or

(C) a reduction in the amount of the liability on the judgment.

(2) Notwithstanding voidability of a transfer under this chapter, to the extent of the value of any improvements made by a good faith transferee, the good faith transferee is entitled to a lien on the asset transferred prior to the rights of a voiding creditor under this chapter.

(e) A transfer is not voidable under Section 24.005(a)(2) or Section 24.006 of this code if the transfer results from:

(1) termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or

(2) enforcement of a security interest in compliance with Chapter 9 of this code.

(f) A transfer is not voidable under Section 24.006(b) of this code:

(1) to the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless the new value was secured by a valid lien;

(2) if made in the ordinary course of business or financial affairs of the debtor and the insider; or

(3) if made pursuant to a good-faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

Amended by Acts 1987, 70th Leg., ch. 1004, § 1, eff. Sept. 1, 1987; Acts 1993, 73rd Leg., ch. 570, § 11, eff. Sept. 1, 1993.

[1] V.T.C A. Bus. & C. § 9.101 et seq.

Application of 1987 Act to transfers made and obligations incurred with respect to its effective date, see note following § 24.007.

§ 24.010. Extinguishment of Cause of Action

(a) Except as provided by Subsection (b) of this section, a cause of action with respect to a fraudulent transfer or obligation under this chapter is extinguished unless action is brought:

(1) under Section 24.005(a)(1) of this code, within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant;

(2) under Section 24.005(a)(2) or 24.006(a) of this code, within four years after the transfer was made or the obligation was incurred; or

(3) under Section 24.006(b) of this code, within one year after the transfer was made.

(b) A cause of action on behalf of a spouse, minor, or ward with respect to a fraudulent transfer or obligation under this chapter is extinguished unless the action is brought:

(1) under Section 24.005(a) or 24.006(a) of this code, within two years after the cause of action accrues, or if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant; or

(2) under Section 24.006(b) of this code within one year after the date the transfer was made.

(c) If a creditor entitled to bring an action under this chapter is under a legal disability when a time period prescribed by this section starts, the time of the disability is not included in the period. A disability that arises after the period starts does not suspend the running of the period. A creditor may not tack one legal disability to another to extend the period. For the purposes of this subsection, a creditor is under a legal disability if the creditor is:

(1) younger than 18 years of age, regardless of whether the person is married; or

(2) of unsound mind.

Amended by Acts 1987, 70th Leg., ch. 1004, § 1, eff. Sept. 1, 987; Acts 1993, 73rd Leg., ch. 570, § 12, eff. Sept. 1, 1993. Application of 1987 Act to transfers made and obligations incurred with respect to its effective date, see note following § 24.007.

§ 24.011. Supplementary Provisions

Unless displaced by the provisions of this chapter, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, [aches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement its provisions.

Amended by Acts 1987, 70th Leg., ch. 1004, § 1, eff. Sept. 1, I987.

Application of 1987 Act to transfers made and obligations incurred with respect to its effective date, see note following § 24.007.

§ 24.012. Uniformity of Application and Construction

This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

Amended by Acts 1987, 70th Leg., ch. 1004, § 1, eff. Sept. 1, 1987.

Application of 1987 Act to transfers made and obligations incurred with respect to its effective date, see note following § 24.007.

§ 24.013. Repealed by Acts 1993, 73rd Leg., ch. 570, § 16, eff. Sept. 1, 1993

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
AUG 12 1996
CLERK

No. 96-55

In The

Supreme Court of the United States

October Term, 1995

BAYSHORE NATIONAL BANK OF LA PORTE,

Petitioner,

vs.

DEAN RAY EVANS and JANE ELAINE EVANS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a debtor's intent or motivation, rather than the type of transfer, is the operative element for determining whether a debtor should be discharged under 11 U.S.C. § 727(a)(2)(A).

2. Whether a debtor's intent behind a transfer is inherently an issue of fact which should not generally be subject to disposal by summary judgment.

3. Whether the statutory period of one year under 11 U.S.C. § 727(a)(2)(A) directly conflicts with the statutory period of states' fraudulent transfer statutes such as the Texas Fraudulent Transfer Act, Tex. Bus. & Comm. Code § 24.001 *et seq.* (Vernon 1993).

4. Whether an equitable lien can be imposed on an exempt homestead when a debtor, with an intent to hinder, delay or defraud creditors, transfers all of his non-exempt assets into that exempt homestead.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Dean Ray Evans and Jane Elaine Evans ("Respondents") request that this Court deny the petition for writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit entered in this case on February 7, 1996.

STATEMENT OF THE CASE

This is a bankruptcy discharge case decided under Texas law.

This is a no evidence and insufficient evidence case which is not appropriate for certiorari review. Sup. Ct. Rule 10.

Petitioner is a lending bank which loaned money to a Texas corporation, Men, Inc. Men, Inc. operated a convenience store located in La Porte, Texas. Respondents are a husband and wife who were required by the lending bank to join the corporate borrower in the execution of a bank note in order for the convenience store to receive a bank loan. The respondents brought suit against the lending bank under theories of lender liability as well as facts which relate to bank tying act violations. The convenience store failed. The lending bank filed a counter suit for the unpaid corporate debts. There was no evidence that the respondents personally received the borrowed funds made the subject of the bank's claim for relief.

According to respondent D. Evans' testimony at trial, after four years of litigation and without written or actual notice to the respondents, his attorney entered into a

consent judgment with the petitioner. The consent judgment provided that respondents take nothing against the lending bank but limited the lending bank's recovery to the dollar amount of the original debt, saving the respondents interest and attorney fees.

During the period of this litigation, the respondents bought and sold personal property and real property in the course of their ordinary affairs. The respondents acquired and designated one property as a residential homestead in accordance with state law more than one year prior to their debt relief case.

The respondents' real estate transactions were recorded in the public deed records in accordance with state law at the time of each sale and purchase.

Stock sales and other transactions including a land purchase were conducted under ordinary commercial terms in which checks, receipts and written instruments detailed the transactions.

The respondents sought relief under Title 11, Chapter 7 of the bankruptcy code on November 19, 1991 following the commencement of post judgment collection proceedings by the petitioner.

The respondents disclosed the existence of two cashier checks in the amount of $11,000.00 and $22,000.00 in the debt relief schedules. These cashier checks were tendered along with their deposits to the issuing bank, Texas Coastal Bank as the result of prior unpaid debts due to that bank. Texas law provides a legal priority for Texas Coastal Bank and in the absence of bankruptcy relief, this claim would have been superior to petitioner's claim. The

respondents had unpaid debts due to Texas Coastal Bank in the approximate amount of the cashier checks and deposit accounts at the time the checks were tendered to Texas Coastal Bank.

The proceeds from the cashier checks were paid to the respondents' trustee in bankruptcy in a preference compromise between Texas Coastal Bank and the trustee.

The respondent, Dean Ray Evans, was an outside member of the board of directors for Texas Coastal Bank at the time of the return of the two cashier checks. He was not involved in bank operations or transaction management in the day-to-day business of the bank. He held a position of trust and responsibility for Texas Coastal Bank to review bank lending policy.

Petitioner objected to the respondents' general discharge, sought to have its debt determined non-dischargeable and made an extraordinary claim that an equitable lien be placed on the respondents' Texas homestead and that the bank be allowed to sell the respondents' homestead to satisfy what the trial court determined was a dischargeable debt resulting from a civil judgment.

The bankruptcy trial court rendered a final judgment that petitioner take nothing, ordered a discharge, denied all relief for Bayshore National Bank of La Porte. Upon appeal by the petitioner, the district court for the Southern District of Texas affirmed the bankruptcy trial court.

On further appeal to the Fifth Circuit Court of Appeals and after oral argument, the circuit court

affirmed the district court in a terse three page per curiam opinion by Circuit Judges King, Davis and Barksdale.

The circuit court determined the record supported the findings by the trial court and petitioner had failed to submit sufficient summary judgment evidence of an intent to conceal and because the transaction complained of did not occur within one year of the respondents' bankruptcy filing, the district court did not err in affirming the bankruptcy court's summary judgment. The circuit court determined the record in the trial court, supported the trial court's granting of a general discharge. Per Curiam Opinion, Fifth Circuit Court of Appeals, King, Davis, Barksdale, Circuit Judges. Petitioner's Appendix, pp. 1, 2, and 3.

The circuit court's determination is precedent under the limited circumstances of Local Rule 47.54, Fifth Circuit Court of Appeals.

REASONS FOR DENYING WRIT OF CERTIORARI

This is a debt relief discharge case decided under Texas law. The petition presents four questions. Numbers one and two involve a factual issue of intent and relate to federal law only because they are fact driven in the context of a bankruptcy discharge case. Questions one and two are the result of insufficient evidentiary proof by the petitioner at the pre-trial summary judgment stage and the lack of sufficient evidence submitted at the trial stage of the case to meet the petitioner's burden of proof.

Two questions, numbers three and four, involve the interpretation of Texas law. The questions composed by the petitioner were not addressed by the circuit court in reaching its decision since resolution of the questions was not necessary to the outcome of the case. For this reason, in addition to the basis more fully expanded upon below, the petition for writ of certiorari in this matter should be denied.

1. Questions One and Two Are Not Proper For Further Review or Are Not Properly Presented For Review.

Petitioner presents two questions involving intent by the respondent, D. Evans, in relation to the purchase of a homestead and two cashier checks accounted for to the bankruptcy trustee and tendered to Texas Coastal Bank. However, neither of these questions was addressed by the circuit court in reaching its decision.

This is not surprising for the following reasons:

(i) Petitioner failed to properly or successfully raise its questions involving facts of the case on appeal to the district court or the circuit court. *Bayshore v. Evans*, per curiam (5th Cir. 1996). Petitioner's Appendix, pp. 1, 2, 3. District Court Order, pp. 4 and 5.

(ii) Petitioner failed to meet the burden of proof this court specified for plaintiffs in dischargeability cases, *Grogan v. Garner*, 498 U.S. 279 (1991), and when confronted with a summary judgment motion by a defendant. *Celotex v. Catrett*, 477 U.S. 317 (1988).

(iii) Petitioner failed at trial to meet the burden of proof required for the relief requested.

In order to determine if summary judgment was proper in this case, each court has been required to interpret and apply both Texas law and United States bankruptcy laws. Issues of law were reviewed on a de novo standard. Issues of fact were examined on a clearly erroneous standard in accordance with current law.

At the time of the trial of this case, petitioner failed to meet the burden of proof for non-dischargeability of its debt or a discharge denial as the result of the cashier check transaction characterized by the trial court as preferential.

Petitioner provided insufficient evidence or no evidence for the relief requested.

Given the points of error presented to the circuit court, the following statement in its opinion provides no basis for discretionary review by this court:

> " . . . because we find that Bayshore did not submit sufficient summary judgment evidence as to the Evans' intent to conceal the transfer or to hinder, delay or defraud and because the transfer did not occur within one year of the Evans' bankruptcy filing, we conclude that the district court did not err in affirming the bankruptcy court's summary judgment . . . After a trial on the merits the bankruptcy court found that D. Evans' transfer of the cashier checks was a preferential payment and not a transfer made to hinder, delay or defraud creditors. The record supports that finding." *Per curiam*, 5th Cir. 1996, Petitioner's Appendix pp. 1, 2 and 3.

The basis expressed by the circuit court to affirm the district court and the trial court establishes that the questions presented by petitioner (Petition, page i) were not relevant in the disposition of the case.

A review of the circuit court and trial court determinations demonstrates that the case was decided on factual grounds to which proper legal standards were applied.

In this regard, petitioner did not appeal to the circuit court on the clearly erroneous standard a material fact finding made by the trial court, but rather argued that the trial court misapplied the law to the facts.

Not recognizing this flaw, petitioner argues that the denial of the extreme relief requested has resulted in a departure from existing law and that this court should therefore exercise its supervisory powers. Petition, p. 18.

The flaw in this type of argument is apparent. The intent questions on which petitioner seeks review were not addressed by the circuit court and, therefore, are not properly presented for determination given the legal and factual record for this case.

The legal standard affirmed on appeal by the circuit court on the issues of intent complained of by the petitioner are only the legal result of the failure of the petitioner to meet the burden of proof in the trial court for the relief requested.

2. Question Three and Four Presented by Petitioner Deal With Properly Applied State Law and Matters Pre-Empted by Federal Bankruptcy Law.

Questions number three and four asserted by petitioner deal with the interpretation of state law and the legal result of federal preemption in bankruptcy matters. Petitioner argues in question number three that there is a conflict between 11 U.S.C. § 727(a)(2)(A) and Texas Fraudulent Transfer Act, Tex. Bus. & Commerce Code, § 24.001, *et seq.* (Vernon's 1993). *See*, Petition Question 3, pp. i, 22.

Petitioner argues in question number four that it was deprived by the trial court of a state law remedy for an equitable lien to be imposed on a Texas homestead. Petitioner failed to demonstrate to the trial court by admissible evidence that it was legally entitled to an equitable lien on exempt property under Texas law.

This Court stated in *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944), "ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *Id; see also Virginia v. American Booksellers Assn.*, 484 U.S. 383, 395 (1988). "This Court rarely reviews a construction of state law agreed upon by the two lower federal courts".

Supreme Court Rule 10 instructs practitioners that the interpretation of state law and issues of fact are not suitable for discretionary review by the Court except in the most unusual circumstances. There are no unusual circumstances in this case. In the present case, petitioner brings two questions involving Texas law, yet does not

show that state law was misapplied and not subject to preemption by federal bankruptcy law.

3. Corrections Of Misstatements In The Petition.

Pursuant to Sup. Ct. Rule 15.1, the following misstatements are brought to the Court's attention.

Petitioner misstates the bankruptcy court's findings when it recites the trial judge found that respondent Evans had an intent to defraud, hinder or delay his creditors. Petitioner further misstates the record when it alleges that the circuit court has misrepresented the findings of the bankruptcy court. Petition page 17.

The petitioner argues that the circuit court decision is erroneous and conflicts with *International Shortstop,* 838 F.2d 1257 (5th Cir. 1991) and *In re Oliver,* 819 F.2d 550 (5th Cir. 1987). The decisions in *International Shortstop* and *Oliver* have little or no application to the facts of this case. Petitioner argued there was a continuing concealment and that the respondent D. Evans' preference payment was fraudulent to delay or hinder creditors. The trial court did not make such a finding. Petitioner failed to meet the burden of proof in the trial court for the relief requested.

Petitioner did not raise a conflict of law argument in the trial court, the district court or to the circuit court. Each reviewing court determined that the petitioner failed to establish that the transactions decided by summary judgment occurred within the statutory time period of one year specified by 11 U.S.C. § 727(a)(2)(A) or were concealed.

The circuit court merely made the uncontroversial determination that petitioner failed to provide sufficient evidence of concealment and a debtor cannot be denied a discharge for transfers which did not take place during the one year period specified by 11 U.S.C. § 727(a)(2)(A).

Petitioner conceded the transactions complained of occurred more than one year prior to the commencement of the debt relief case, but argued there was a concealment of the transactions. Petitioner failed to provide sufficient evidence in the trial court to prove concealment.

There is no conflict between the bankruptcy code and Texas Business & Commerce Code § 24.001, *et seq.*, Petitioner's Appendix, pp. 35-50, and if a conflict does exist, the Texas statute is pre-empted in accordance with long standing supremacy standards of federal bankruptcy law.

The supremacy clause requires courts to follow federal not state law in the context of constitutionally provided legal relief. U.S. Const. Art. VI Cl. 2, *see, Barret Bank v. Nelson*, 517 U.S. ___, 134 L.Ed.2d 237, 116 S.Ct. ___ (1996), the most recent case from this court reviewing the federal preemption doctrine.

The respondents' transactions involving real property were recorded and filed of record in accordance with state law.

Texas law recognizes concealment in the context of pretended transfers. There was no evidence of the use of a "straw man" or a pretended transfer of any asset.

Texas law recognizes the remedy of constructive trust or equitable lien when the creditor traces the funds loaned into the purchase of exempt property. There was

no evidence any funds borrowed from the petitioner were used to purchase the exempt homestead or the cashier checks accounted for in the bankruptcy case.

There is no remedy of an equitable lien on exempt property provide by Title 11, Section 727. *See*, Petitioner's Appendix pp. 31, 32, 33, 34.

There is no remedy or relief under the Texas Fraudulent Transfer Act, Tex. Bus. & Comm. Code § 24.001, *et seq.*, Petitioner's Appendix pp. 35-50 to which petitioner demonstrated by admissible evidence that it was entitled.

Petitioner's evidence was insufficient for the relief requested.

Petitioner fails to properly present any Texas authority inconsistent with the circuit court's interpretation of the statutes at issue. *See*, Title 11, Sec. 727, Petitioner's Appendix, pp. 31, 32, 33, 34. The two questions concerning Texas law set forth in the petition were not reached by the district court or the circuit court and are not appropriate for review by this Court.

4. No Basis Is Shown To Grant Petitioner Discretionary Review

There is no broad policy basis for review by this court. There is no important question of federal law. There is no departure from existing law that warrants the court to exercise its supervisory powers. There is no federal question that has been decided in a way that conflicts with decisions of the courts of appeals on the same question.

Petitioner failed in the trial court to meet the burden of proof for the relief requested.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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